In the High Court of Punjab and Haryana at Chandigarh

C.R. No.1019 of 2006 (O&M)
Date of decision: 09-2006

Sushil Kumar Bansal and others .....Petitioners

Versus

Surinder Pal Sharma and others .....Respondents

CORAM: Hon'ble Mr.Justice Vinod K.Sharma

Present: Mr.Amit Rawal, Advocate, for the petitioners.
Mr.Sunil Chadha, Advocate, for the respondents.

VINOD K.SHARMA,J.

The petitioners have challenged the order dated 25-01-2006 passed by the Civil Judge (Junior Division), Ludhiana, vide which the application moved by them under Order 7 Rule 11 of the Code of Civil Procedure for rejection of plaint for want of leave to institute a suit under Section 92 CPC has been declined.

The respondent-plaintiffs filed a civil suit under Section 92 of the Code of Civil Procedure (for short the 'Code') for framing a scheme for appointment of new Trustees/Trustees for proper and effective administration and management of Public Religious and Charitable Endowment property known as KHUI TILAK RAM measuring 3 kanals 16 marlas comprised in Khewat No.1356 Khatauni No. 1507, Khasra Nos.370,371,372 as per jamabandi for the year 2000-01 of Taraf Karabara and Khasra No. 1708 min, 1708/1 min and Khasra Nos. 2247/2113, 2228/2112, 2246/2181 as per jamabandi for the year 1935-36 on Ferozepur Road, Tehsil and District Ludhiana and further directing the petitioner-defendants to render accounts for settling the claim

for proper administration of the trust in terms of the trust deed dated 2-04-1938 and for mandatory injunction directing the defendant-petitioners to remove the illegal and unauthorised construction as shown red in the plan attached with the suit and encircled in green as well as for a decree of perpetual injunction restraining the petitioner-defendants from raising any construction in contravention of the terms of the above said trust deed in any part of the suit property and changing the user of the said property on the basis of oral and documentary evidence.

Along with the suit, the respondent-plaintiffs also filed an application seeking leave to file the suit under sub-section (1) of Section 92 of the Code.

On 5th of December, 2005, the learned Civil Judge (Jr. Divn.), Ludhiana, passed the following order:-

> " Present: Counsel for the plaintiff.
>
> Suit received by entrustment. Office report seen. Be registered. Ex-parte interim is ordered. I have perused the file. To prevent irreparable loss to the plaintiffs in the light of the trust deed, jamabandi, injunction is ordered. The order dated 25-01-1995 on record. Parties are directed to maintain status quo regarding nature of suit property strictly till 3.1.2006. The order is subject to the service of defendants. Compliance under Order 39 Rule 3 be made.
>
> Notice of suit also be given to Defendants for 3-1-2006.
>
> 5/12/05 Sd/CJJD, Ldh."

The case of the petitioners is that the reading of the above order shows that no specific order allowing the leave to plaintiff-respondents to

institute the suit was granted by the Court.

On 3rd of January 2006, the following order was passed by he trial Court.

> "Sh. M.C.Sehgal, Adv. filed Power of Attorney on behalf of Defendant No.1. He has also appeared on behalf of Defendant No.3 and has promised to file power of attorney on the next date of hearing. For filing power of attorney and WS to come up on 9-1-2006. Status quo granted earlier stands extended.."

Again On 9th of January and 18th of January 2006 following orders were passed by the Court below:-

> "Status quo against defendant No.2 stands vacated till unserved. Now notice in routine to Defendant No.2 be issued for the date fixed i.e. 18-1-06."

> "Present: Counsel for plaintiff.
>
> Counsel for defendant No. 1 & 3.
>
> Shri A.C.Gupta Adv. has filed P.O.A on behalf of defendant No.2. Reply also filed and for arguments to come on 21-1-2006.
>
> Sd/ -CJJD/18.1.06."

In pursuance to the notice issued, petitioner Nos.1 & 3 appeared and filed an application under Order 7 Rule 11 of the Code seeking rejection of the plaint stating therein that the learned trial Court had no jurisdiction to entertain and try the present suit as the said suit under Section 92 could be filed only in the principal Court of original jurisdiction or in any Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of subject matter

of trust is situated. It was also pleaded that suit under Section 92 of the Code could only be filed with the leave of the Court and the respondent-plaintiffs not having obtained any leave of the learned trial Court before filing the instant suit under Section 92, as such the suit was not maintainable and the plaint was liable to be rejected.

The respondent-plaintiffs contested the said application on the ground that the suit was filed along with an application under sub-section (1) of Section 92 of the Code seeking leave of the Court and, therefore, implied permission would be deemed to have been granted and no specific order granting leave to bring the suit was necessary, as it was an administrative order, so speaking order was not required to be passed separately. It was the further stand of the respondent-plaintiffs that it was a matter between the Court and the plaintiffs and the defendant-petitioners had no locus standi to raise such objection. The said application was dismissed by the learned trial Court by holding that in the State of Punjab suits are entrusted in the Court of Senior Sub Judge on behalf of the learned District Judge. Hence the suit was rightly filed in the Court of Civil Judge (Senior Division), which is termed to be a Principal Court in the State of Punjab. However on the second ground regarding leave of the court, it was observed that once the application of the plaintiff-respondents for grant of leave was on the file and the Court granted status quo regarding the suit property ex-parte, it has to be treated to be implied leave.

The learned trial Court was further pleased to hold that as the grant of leave under Section 92 of the Code was only an administrative order and the purpose of Legislature only was that frivolous suits are not

filed against the Trust, the grant of leave depends upon subjective satisfaction of the Court only and the notice to the defendants before grant of leave is not necessary.

The learned trial Court further came to the conclusion that permission of the Court can be granted subsequently also and it was open to the defendant-petitioners to contest the question of permission on merit by opposing the same in the written statement even if it was taken to be implied permission in the order granting status quo. The Court also held that the defendant-petitioners were free to contest the question of leave already impliedly granted to the plaintiff-respondents.

Mr. Amit Rawal, learned counsel for the petitioner, challenged the findings recorded by the learned trial court primarily on the ground that a suit under Section 92 of the Code can be filed only with a prior permission of the Court and the defect in obtaining the leave of the Court can not be cured by grant of leave subsequent to the filing of the same and in support of this contention, he placed reliance on the judgment of this Court in the case of **Maharishi Dayanand Education Society Vs. Satyendra Bhadana, 1999 (1) CCC 518**.

The learned counsel for the petitioners thereafter by placing reliance on the judgment of the Hon'ble Orissa High Court in **Kintali China Jaganadham and others V. Laxmi Naidu and others, AIR 1988 Orissa 100** contended that if permission is subsequently granted, then suit has to be treated to have been instituted from the date on which the leave was obtained. He referred to para 8 of the said judgment, which reads as under:-

" The next question is: In the face of the settled legal position

that grant of leave is condition precedent to the institution of the suit, what is the effect of grant of leave during the pendency of the suit after its institution.? An application under S 92 was filed before the Court. The Court was prima facie satisfied that having regard to the allegations leave ought to be granted and did grant leave. The proper course should have been for the plaintiffs to seek leave under S. 92 and append to their application a draft copy of the plaint of the proposed suit to satisfy the Court that the proposed suit came within the purview of Sec.92 The consensus of opinion amongst the High Courts is that the jurisdiction of the Court Under S 92 (1) while granting leave is administrative in nature and the notice on the other side need not be issued. But the Court must give reasons for its decision either granting or refusing leave. In this case, the plaintiffs have reversed the process. They instituted the suit and months thereafter filed the application for leave which has been granted. What is the answer to the problem? In my opinion, the institution of the suit prior to the grant of lave was without jurisdiction and, therefore, non est. Inasmuch as the plaintiffs can institute the suit immediately after the grant of leave, there is nothing wrong in treating the suit to have been instituted on the date on which leave was obtained. I get support from the reasonings of the Supreme Court in AIR 1971 SC 1292 (Bansidhar Sankarlal Vs. Md. Ibrahim), where it was contended that institution of a proceeding in execution of a decree against a Company without obtaining the leave was incompetent. Their Lordships observed:

> ".....The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed to be instituted on the date granting leave."

and approved the decision of the Calcutta High Court in (1950)

54 Cal WN 832 (Suresh Chandra Khannabish V. Bank of Calcutta) (FB) holding as followings."

> " .....The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the High Court."

The reason can be applied to the suit under S.92 also. In Air 1982 Punj. & Har. 137 (supra) leave which is a condition precedent, had not been obtained. Therein, Tewatia J. observed:

> "..... While deciding the two issues, it observed that the plaintiffs have its permission to file the suit and it is from that stage that the trial of the suit would proceed....."

I, therefore, hold that leave under S.92 is a mandatory condition precedent. The proper procedure is for the plaintiff-petitioners to file an application for leave and to append thereto a copy of the draft plaint of the suit proposed to be filed by them in order to enable the Court to grant leave, since leave is to be strictly construed. The suit instituted should be substantially in accordance with the leave granted. Since leave granted is condition precedent, there cannot be validly instituted suit prior to the grant of leave. Generally, a plaint seeking relief or reliefs coming within the purview of S.92 without grant of leave should be refused. But where a suit has been registered or interim orders have been passed prior to the grant of leave, the same shall be held to be incompetent, invalid and non est. Where leave is granted in a pending suit, the plaintiff may either ask for return of the plaint for representation of the same in conformity with the leave granted, or may ask the Court to treat the plaint as instituted on and from the date leave is granted, if the plaint is substantially in conformity with the leave. Where relief sought do not come within the purview of S.92, the Court may either require plaintiffs to amend the plaint

or reserve holding until the final decision."

Learned counsel for the petitioners thereafter placed reliance on the judgment of the Hon'ble Kerala High Court in **Govindan Vs. Koovalasseri Sree Mahadevar Kshethram Trust and others, AIR 2002 Kerala 47** to contend that even if the suit is instituted alongwith an application for leave to defend, no interlocutory order can be passed before such a permission was granted.

The learned counsel for the petitioners also placed reliance on the judgment of this court in the case of **Sant Lal Vs. Sudakar, 2000 (2), Civil Court Cases 406** to contend that for filing of a suit against a public trust, leave of the Court is a condition precedent and in case the suit has been instituted without the leave of the Court, it suffers from such defects as envisaged under clause (a) or clause (d) of Rule 11, Order 7 CPC and plaint must be rejected straightway at the threshold. He also contended that normally a notice is required to be given to the opposite party before the leave is granted. He referred to para 18 of the said judgment, which reads as under:-

> " In Kintali China's case (supra), a learned Single Judge of the Orissa High Court was confronted with the problem, which arose in the case where the plaintiffs instituted the suit and 4 months thereafter, filed the application for leave which had been granted by the trial Court under Section 92 CPC. Among the cases referred for discussion, learned Single Judge's decision of this Court in Prithipal Singh's case (supra) was also cited. But it appears that the other decisions, discussed above including the Division Bench Judgment of this Court in Lachhman Dass's case (supra) were not cited for discussion.

Having regard to the intent and purpose of the provisions made in Section 92 CPC. The learned Single Judge held that grant of leave by Court is a condition precedent and it is mandatory."

Mr. Sunil Chadha, learned counsel appearing on behalf of the plaintiff-respondents, supported the impugned order passed by the learned trial court by placing reliance on the judgment of the Hon'ble Gauhati High Court in **Bhagawan Chandra Lakhar Vs. Union of India & Others, 1994 (1) CCC 626** to contend that need of passing a formal order was not necessary as the granting of leave can be implied and can be gathered from what the Court does. The contention of the learned counsel was that once an application was filed alongwith the suit seeking leave to file the suit under Section 92 of the CPC and the Court passed an order of status quo, then the permission can be implied and no fault can be found with the said order.

Learned counsel for the respondents also placed reliance on the judgment of this Court in **Basheshwar Dass Vs. Zile Singh, 2001 (3) RCR (Civil) 459** to contend that if a suit is filed along with various applications including an application under Section 92 and the Court passed order simultaneously on all the applications, then it cannot be said that there was any defect in treating the suit to have been filed with implied condition especially when liberty has been granted to the defendant-petitioners to contest the leave to defend in the written statement to be filed.

Learned counsel for the respondents placed further reliance on a Division Bench judgment of this Court in the case of **Lachhman Dass Udasi and others Vs. Ranjit Singh and others, (1986-2) PLR 522** to

contend that no notice was necessary to be issued to the defendants prior to the granting or refusing of the leave to file a suit under Section 92 as the order is administrative in nature.

I have considered the arguments raised by the learned counsel for the parties and find force in the present revision petition.

The judgment of the Orissa High Court in **Kintali China's** case (supra) is based on the judgment of the Hon'ble Supreme Court in AIR 1971 SC 1292, wherein it has been held that though under under Section 92 (1) of the Code is administrative in nature and no notice is required to be issued, but it was incumbent on the Court to give reasons for its decision either granting or refusing leave. Thus from the reading of the said judgment it can be safely stated that there can be no implied permission and it was incumbent on the Court to pass a formal order though without notice to the defendant-petitioners. It may further be noticed that this Court in the case of **Maharishi Dayanand Education Society (supra)** was pleased to hold that defect cannot be cured by granting subsequent leave by the Court under Section 92 of the CPC. In the present case, the orders passed by the Court below do not show either explicit or implied written permission to institute the suit.

The reliance by the learned Counsel for the respondents on the judgment of the Gauhati High Court in **Bhagawan Chandra Lakhar's case (supra)** is totally misconceived as in the said case the Court was considering the leave under Section 80 of the Code, where the Court is empowered to waive the notice and therefore, the said judgment has no application to the suit filed under Section 92. The judgment of this Court

in **Basheshwar Dass's case (supra)** relied upon by the learned Counsel for the respondents is also of no help to him as in this case permission was granted along with orders passed on other applications, whereas no such permission has been granted in the present case.

The reliance by the learned counsel for the respondents on the Division Bench judgment of this Court in **Lachhman Dass Udasi's case (supra)** is also of no help as it merely lays down that the order is administrative in nature. This judgment nowhere lays down that from the proceedings implied permission can be inferred. Even an administrative order is required to be passed and it cannot be implied.

In view of what has been stated above, this revision petition is allowed and the impugned order is set aside. However, keeping in view the fact that the respondent-plaintiffs had moved an application for leave to file the suit under Section 92 of the Code along with the suit, it would be appropriate to direct the trial Court to dispose of the same and in case such leave is granted, the suit would be deemed to have been instituted from said date.

September ,2006 **(VINOD K.SHARMA)**
'dls' **JUDGE**